Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	MB Docket No. 07-269

COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL

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EXECUTIVE SUMMARY

Rate Counsel welcomes the FCC's *Further Notice* and is hopeful that the *14th Report* will reflect fully the evolving technological and market structure changes in the video programming industry. The FCC has raised numerous questions in its *Further Notice.* In these initial comments, Rate Counsel addresses selected topics, and based on its review of others' comments, may address additional issues in its reply comments. As a threshold matter, however, because effective competition is absent in most relevant markets, Rate Counsel urges the Commission to establish detailed price, cost and revenue reporting requirements so that the Commission can provide adequate oversight of the video industry. The purpose of such reporting is to assist the Commission in ensuring that consumers have access to diverse video programming at affordable rates and reasonable terms and conditions.

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I. INTRODUCTION

The New Jersey Division of Rate Counsel ("Rate Counsel") as an agency representing New Jersey consumers[1] hereby submits comments in response to the Further Notice of Inquiry ("Further Notice") issued by the Federal Communications Commission ("FCC" or "Commission") seeking data, information, and comment on the state of competition in the delivery of video programming for the Commission's Fourteenth Report ("14th Report").[2]

Today's supply of the delivery of video programming is seemingly diverse: telecommunications providers, cable companies and direct broadcast satellite ("DBS") providers

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1/ Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities.

2/ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Further Notice of Inquiry, FCC 11-65, released April 21, 2011 ("Further Notice").

all offer video programming, as do fledgling online video distributors ("OVDs"). These attributes of today's industry would seem to offer the promise of competition. However, increasing market concentration resulting from various mergers including, most recently, the acquisition by Comcast Corporation ("Comcast") of NBC Universal Inc. ("NBCU"), threatens consumers' access to reasonably priced and diverse video programming.[3] The increasingly entrenched duopoly that exists throughout relevant markets in the United States, often consisting of incumbent cable television providers and incumbent local exchange carriers ("ILECs"), is jeopardizing the provision of affordable and diverse video programming. Therefore, Rate Counsel welcomes the FCC's efforts to obtain data to "provide a solid foundation for Commission policy making with respect to the delivery of video programming to consumers."[4]

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[3] / *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, FCC 11-4, at Appendix A (rel. Jan. 20, 2011) ("*Comcast-NBCU Order*"). See Rate Counsel Reply Comments, July 21, 2010, Rate Counsel *ex parte* filing, December 13, 2010. Rate Counsel's filings show that the Comcast-NBCU merger yields greater incentive and ability for Comcast to discriminate against rivals, squelch the fledgling online video industry (which Comcast clearly views as a direct threat to its traditional cable revenue streams), and shelter its market power. *See also Comcast-NBCU Order,* Dissenting Statement of Michael J. Copps, stating, among other things, at 1: "I understand that economies and efficiencies could accrue to the combined Comcast-NBCU venture, but look a little further into the decision and you will find that any such savings will not necessarily be passed on to consumers. When they tell you that at the outset, don't look for lower cable or Internet access bills." *See also, id.*, at 2: "The Comcast-NBCU joint venture opens the door to the cable-ization of the open Internet. The potential for walled gardens, toll booths, content prioritization, access fees to reach end users, and a stake in the heart of independent content production is now very real."

[4] / *Further Notice*, at para. 1.

II. VIDEO PROGRAMMING MARKET

If controlled by only a few suppliers, new technology will not necessarily lead to diversity and reasonable rates.

The FCC observes that DBS provides video programming to over 33 million subscribers, cable offers video service to approximately 60 million subscribers, and major telephony providers (such as Verizon Communications ("Verizon") and AT&T, Inc. ("AT&T")), offer video programming to approximately 6.5 million subscribers.[5] Furthermore, the FCC observes that OVDs have created "the potential to expand consumer choice further."[6] Certainly the deployment of new technologies and innovation continue to alter the video programming market,[7] but when multi-billion dollar behemoths such as Comcast now control fledgling new entrants such as Hulu, the benefits of such innovation may accrue more slowly or at higher prices, thereby denying consumers the full benefits that otherwise might exist. Therefore, in assessing the video programming market, the FCC should examine carefully the level of control exercised by the largest suppliers, and the impact of such control on the quality and prices of video programming.

Rate Counsel welcomes the FCC's plan to include OVDs in its *14th Report*,[8] and urges the FCC to include information about the ownership and control of any OVD because the identity and presence of a corporate parent affects the extent to which any particular OVD

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5 / *Id.*, at para. 2, cites omitted.

6 / *Id.* The FCC also states that it intends to treat OVDs as a separate group because it has "concluded that for most consumers they are not a substitute for MVPD service today, but rather an additional method for viewing video programming." *Id.*, at footnote 16, citing *Comcast-NBCU Order*, at paras. 79-85. In order to receive video programming from OVDs, consumers need broadband access. *Further Notice*, at footnote 9.

7 / *Further Notice,* at para. 2.

8 / *Id.*, at para. 4.

represents competitive discipline in the video programming market. For example, Hulu is an important OVD, but it is also essential that the FCC's *14th Report* clearly identify Hulu's ownership. Rate Counsel also supports the FCC's proposed analytic framework under which it will categorize entities into one of three groups: multichannel video programming distributors ("MVPDs"), broadcast television stations, and OVDs, and will examine industry structure (*e.g.*, factors such as the number and size of firms, horizontal and vertical integration, conditions affecting entry and the ability to compete), industry conduct (*e.g.*, factors such as product differentiation, advertising and marketing, and pricing), and industry performance (*e.g.*, factors such factors as prices charged, and revenue and profit margins).[9]

Comprehensive data is essential to ensure that the market is functioning efficiently.

The FCC seeks comment on other sources of data that it should "use to perform a comprehensive analysis of the delivery of video programming."[10] The FCC needs good data on the relationship of companies' costs and rates so that the FCC can exercise its regulatory oversight adequately and efficiently. Cable prices are high, yet relevant cost data is sorely lacking that would enable the FCC to determine whether prevailing prices are supracompetitive. The FCC should require companies to provide "ARMIS-like" cost and revenue data so that the FCC can protect consumers and competitors from unfair rates and the misallocation of joint and common costs.[11]

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9 / *Id.*, at para. 5.

10 / *Id.*, at para. 6.

11 / Automated Reporting Management Information Systems ("ARMIS") reports were filed for many years by telephone companies. The FCC's website states: "The Automated Reporting Management Information System (ARMIS) was initiated in 1987 for collecting financial and operational data from the largest carriers. Additional ARMIS reports were added in 1991 to collect service quality and network infrastructure information from local exchange carriers subject to price cap regulations, in 1992 for the collection of statistical data formerly included in

MVPD Structure

Among other issues, the FCC seeks "comment on the most appropriate unit of measurement for assessing geographic coverage."[12] In the context of assessing competition for cable services, the FCC has already determined that a "zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information."[13] Rate Counsel supports the use of the most granular level in determining geographic markets. The FCC should apply the same level of geographic disaggregation to all video programming providers and use zip code plus four analyses.

MVPD Conduct and Performance

There is no evidence that cable rates presently are just and reasonable, and common sense would suggest otherwise.[14] Companies often offer relatively lower "introductory" rates[15] and

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Form M, and in 1995 for monitoring video dial tone investment, expense and revenue data. (The video dial tone reporting requirement was eliminated by the Telecommunications Act of 1996.) ARMIS filing requirements were reduced significantly beginning with 2008 data by Commission forbearance orders." http://transition.fcc.gov/wcb/armis/descriptions.html. The FCC also explains: "Commission action taken in the ARMIS Forbearance Order impacts ARMIS data filed for reporting year 2010 and beyond. In that Order, the Commission granted conditional forbearance from carrier obligations to file ARMIS Reports 43-05 and 43-06 provided that the carriers committed to file the data voluntarily for 24 months after September 6, 2008. The 24 months ended on September 6, 2010; and carriers do not file Reports 43-05 and 43-06 for reporting year 2010 and subsequent years." http://transition.fcc.gov/wcb/eafs/help/system_changes.html.

12 / *Further Notice*, at para. 11.

13 / *In the Matter of Comcast Cable Communications, LLC, Petition for Determination of Effective Competition in Maryland and West Virginia Franchise Areas*, CSR 8476-E, *Memorandum Opinion and Order*, DA 11-934, released May 23, 2011, at footnote 15.

14 / *See, e.g.* "Comcast Reports 1st Quarter 2011," which states, among other things: "Strong Financial and Operating Momentum at Cable Communications, Solid Cable Networks Performance at NBCUniversal, Consolidated Revenue Increased 31.8%, Operating Cash Flow Increased 14.1% and Operating Income Increased 14.9%, EPS Increased 9.7% to $0.34; Excluding Transaction-Related Costs, Increased 16.1% , Free Cash Flow increased 17.7% to $2.2 Billion." http://www.cmcsa.com/releasedetail.cfm?ReleaseID=574179

15 / Furthermore, there is no evidence that even the introductory rates are reasonable.

then are able to raise their rates, seemingly without limit for various reasons (each of which merit the Commission's further analysis). For example, the transaction costs of changing suppliers are high and include such costs as new equipment and a new e-mail; the ILEC may not offer broadband service at as high a speed as does the cable company; a customer may not want to lose access to the cable television programs offered by the cable company; in a duopoly, the "alternative" provider may also charge supracompetitive rates. Even those consumers who are willing to migrate back and forth between, for example, Verizon and Comcast, availing themselves repeatedly of a limited 6-month price, are still typically choosing between only two suppliers.[16] The FCC should monitor not only the introductory rates, but the rates that apply once introductory periods have ended. Rate Counsel also supports the FCC's collection of price data for DBS, AT&T U-verse, and other MVPDs that are not included in the Annual Cable Price Survey.[17] Furthermore, it is critically important to monitor the existence and extent of tying of access to online programming to MVPD subscriptions.[18] Tying limits consumer choice and inhibits competition.

Rate Counsel has, for many years, expressed concern about the failure of a duopoly to yield effective competition. Rate Counsel is also concerned that, except where ILECs have deployed fiber to the home (e.g., Verizon's FiOS) or fiber to the curb (e.g., AT&T's U-verse),

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[16] / Comcast offers: "Digital Starter TV and Performance Internet" for $69.99 per month for six months, and offers "Starter XF Triple Play, TV, Phone & Internet" for $99 per month for 12 months. http://www.comcast.com/Corporate/Learn/Bundles/doubleplay.html?INTCMP=ILCCOMCOMDP163078, site visited June 6, 2011. Verizon offers FiOS TV and FiOS Internet "starting at" $74.99 per month, and offers FiOS triple play "starting at" $84.99 per month. http://www22.verizon.com/residential/bundles/overview#fios, site visited June 6, 2011.

[17] / *Further Notice*, at para. 27.

[18] / *Id.*, at para. 28.

cable companies' significantly higher broadband speeds may lead to an effective monopoly in many broadband markets, which, in turn, affects the prospects for video programming distribution. Furthermore, in March 2010, Verizon announced that it would stop rolling out its FiOS.[19] As of June 2010, cable companies controlled 56% percent of households' wireline broadband access.[20]

The companies that control consumers' broadband access increasingly control the video programming that such access enables. However, despite the growing importance of this "gatekeeper" issue[21] – that is, the entity that controls the broadband pipe can control the content that is delivered over that pipe – the FCC, in its *Internet Access Services Report*, focuses primarily on broadband speed, adoption, and availability, without sufficient reference to and analysis of the composition of the suppliers.[22] Instead, the FCC, in collecting and reporting data, whether regarding the broadband market or the video programming market, should also focus on

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19 / "Verizon puts Boston on hold as FiOS rollout ends," Donna Goodison, *Boston Herald,* Friday, March 26, 2010.

http://www.bostonherald.com/business/technology/general/view.bg?articleid=1242614&srvc=next_article

20 / "Internet Access Services: Status as of June 30, 2010," Industry Analysis and Technology Division, Wireline Competition Bureau, March 2011 ("FCC Internet Access Services Report"), Chart 7, at page 24. Mobile wireless accounts for 42.4% of residential broadband connections and 57.6% of residential broadband connections are wireline. Of the total residential broadband connections, 32.3% are provided by cable modem. *Id.*

21 / As Commissioner Copps has observed: "Individual gatekeepers may change over time—tomorrow's might not be today's—but somehow the urge to be the keeper of the keys seems always to survive through generations of technology change. So it happened, as the doors were opened to the seemingly limitless prospects of the new media age, that public policy-makers once again became the willing accomplices of special interests. Indeed, the FCC spent the first eight years of the new century removing broadband from any meaningful public policy oversight, deregulating the telecom/cable duopoly, and blessing evermore competition-killing consolidations that narrowed consumer choice and inflated consumer bills." "Getting Media Right: A Call to Action," Commissioner Michael J. Copps, Columbia University School of Journalism, New York City, December 2, 2010, at 2.

22 / *See, e.g.,* discussion in *FCC Internet Access Services Report*, at pages 1 through 12, which summarizes the report, but does not highlight the degree to which cable modem service dominates wireline broadband access (nor the dominance within the cable industry by few cable companies), and the consequences of such dominance for video programming.

broadband ownership because of its direct impact on video programming, and the opportunity (or lack thereof) for diverse services offered at reasonable rates, terms, and conditions.

In order to assess industry conduct (whether or not it results from horizontal and vertical mergers), the FCC should routinely examine comprehensive pricing information that companies should be required to submit to the FCC.[23] Rate Counsel fully supports the FCC's analysis of the impact of mergers on MVPD's market power and the FCC's analysis of relevant evidence regarding the exercise of such market power.[24]

Furthermore, the FCC should require all video programming providers to submit data regarding monthly and nonrecurring rates, as well as information regarding terms and conditions (*e.g.*, early termination fees). Web sites may include information on introductory rates, but not provide readily available information on the prices that would pertain once a consumer's "introductory" period has extended. Also web sites may require a user to enter information about an address in order to "build a bundle"[25] Companies should provide the FCC with information on à la carte rates for video packages as well as various tiers of service. FCC Staff should not be required to "hunt down" this information by inputting zip code and other information, particularly because companies readily possess the information.

Furthermore, the FCC should require all video programming providers to offer consumers à la carte options so that consumers can customize their viewing options. Companies should not be allowed to require customers to purchase more than they want, and, similarly, consumers should not be penalized through high prices for selecting à la carte.

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23 / *Further Notice*, at para. 30.

24 / *Id.*

25 / *See, e.g.*, http://www22.verizon.com/residential/bundles/overview#fios.

Rate Counsel fully supports the FCC's analysis of horizontal and vertical market concentration.[26] Furthermore, it is critically important that the FCC obtain data and information regarding non-regulatory conditions affecting entry and rivalry.[27] Bundling MVPD services with broadband, bundling channels into tiers rather than selling them à la carte, and long-term contracts with early termination fees denies consumers choice, inhibits migration by consumers among suppliers and chills competition.[28]

Rate Counsel urges the Commission to collect, analyze, and report data regarding MVPD performance, including data on subscribership, penetration, financial performance, investment, and innovation.[29] The FCC need not re-invent the wheel, but instead, can use as its reporting foundation, the ARMIS reports that it required ILECs to submit for many years. Companies' allocation of costs among video and non-video services directly affects reported profitability and also affects their ability to price in anticompetitive manners.[30]

Broadcast Television Structure

Rate Counsel supports the FCC's interest in obtaining data that will assist it in assessing horizontal concentration and vertical integration in the broadcast television industry.[31] The recent Comcast/NBCU merger was a major event with the full impact on competition in broadcast television still unclear; and certainly, if further vertical integration occurs, it is yet

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[26] / *Further Notice,* at paras. 16-19.

[27] / *Id.*, at para. 22.

[28] / *Id.*

[29] / *Id.*, at paras. 31-35.

[30] / *Id.*, at para. 34.

[31] / *Id.*, at paras. 37-38.

more important for the Commission to monitor the structure of the industry, the impact of such integration on competition, and other conditions affecting entry and rivalry.[32]

Broadcast Television Conduct and Performance

Rate Counsel supports the FCC's collection of information concerning business models and strategies, including such aspects of the broadcast industry as the impact of any tying by broadcast stations of retransmission consent negotiations with MVPDs for linear programming to online programming on competition, consumers' access to news and information programming.[33] Statistics on information such as the quantity of broadcast television stations that offer video content in high definition ("HD"), and the percentages of programming that is offered in HD, as well as viewership data would provide important information.[34] Rate Counsel supports the FCC's efforts to obtain financial data on broadcast television stations as well as information on broadcast television investment in innovations so that the FCC can assess the relative competitive position of broadcast television stations in the video programming delivery.[35] As video programming markets evolve, it is essential that the FCC have access to up-to-date and comprehensive information so that it can assess the degree to which competition is sufficient to protect consumers from such harms as loss of innovation, high prices, or inadequate service quality.

Online Video Distributors: Structure, Conduct, and Performance

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[32] / *Id.*, at paras. 39-40.

[33] / *Id.*, at paras. 41-45.

[34] / *Id.*, at paras. 48-49.

[35] / *Id.*, at paras. 50-51.

OVDs provide an alternative mechanism for consumers to obtain video programming. However, the recent Comcast/NBCU merger not only yielded anticompetitive vertical consolidation in the MVPD market with Comcast's distribution assets, but also yielded anticompetitive horizontal consolidation in the emerging online video market. For this reason, it is critically important that the FCC monitor the OVD market carefully to detect any anticompetitive conduct.[36] In its order approving the Comcast/NBCU merger, the FCC acknowledged the potential danger of the transaction "to the development of innovative online video distribution" and stated:

- *Protecting the Development of Online Competition.* Recognizing the danger this transaction could present to the development of innovative online video distribution, we adopt conditions designed to guarantee *bona fide* online distributors the ability to obtain Comcast-NBCU programming in appropriate circumstances. These conditions respond directly to the concerns voiced by commenters—including consumer advocates, online video distributors ("OVDs") and MVPDs—while respecting the legitimate business interests of the Applicants. Among other things, the Commission:
  - Requires Comcast-NBCU to provide to all MVPDs, at fair market value and non-discriminatory prices, terms, and conditions, any affiliated content that Comcast makes available online to its own subscribers or to other MVPD subscribers.
  - Requires Comcast-NBCU to offer its video programming to any requesting OVD on the same terms and conditions that would be available to an MVPD.
  - Obligates Comcast-NBCU to make comparable programming available on economically comparable prices, terms, and conditions to an OVD that has entered into an arrangement to distribute programming from one or more of Comcast-NBCU's peers.
  - Restricts Comcast-NBCU's ability to enter into agreements to hamper online distribution of its own video programming or programming of other providers.
  - Requires the continued offering of standalone broadband Internet access

[36] / *Id.*, at paras. 52-55.

services at reasonable prices and of sufficient bandwidth so that customers can access online video services without the need to purchase a cable television subscription from Comcast.

- Prevents Comcast from disadvantaging rival online video distribution through its broadband Internet access services and/or set-top boxes.
- Addresses threats to Hulu, an emerging OVD to which NBCU provides programming, that arise from the transaction.[37]

As is the case with all merger conditions, the FCC's merger conditions offer protection for competitors and consumers *only* if the FCC possesses the resources and willingness to enforce them. Often, by the time that anticompetitive harm has occurred, the damage is long-term. Despite Rate Counsel's misgivings about the ability of these conditions to protect the nascent OVD industry, Rate Counsel nonetheless urges the Commission to seek and to analyze the requisite data and information to ensure that Comcast complies with these important conditions.

Other Issues

The FCC also seeks comment on other related issues such as the relative availability and prices of video programming in rural versus urban areas,[38] video content creators and video content aggregators,[39] customer premises equipment ("CPE"),[40] and consumer behavior.[41] Rate Counsel may address these topics in reply comments. Among other things, the FCC should ensure that to the extent that CPE supports not only video programming, but also Internet and voice services, costs should not be recovered exclusively from companies' cable services. Consistent with part (j) of Section 76.924 of the FCC's cable rules, the cost of unrelated

[37] / *Comcast-NBCU Order*, at para. 4.

[38] / *Further Notice*, at paras. 56-59.

[39] / *Id.*, at paras. 60-63.

[40] / *Id.*, at paras. 64-67.

[41] / *Id.*, at paras. 68-69.

expenses should be excluded from the cost categories that are used to develop rates for the provision of regulated cable service and common costs must be allocated in accordance with part (f) of Section 76.924 of the FCC's rules.[42]

III. CONCLUSION

Rate Counsel welcomes the FCC's *Further Notice* and is hopeful that the *14th Report* will reflect fully the evolving technological and market structure changes in the video programming industry. The FCC has raised numerous questions in its *Further Notice.* In these initial comments, Rate Counsel addresses selected topics, and based on its review of others' comments, may address additional issues in its reply comments. As a threshold matter, however, because effective competition is absent in most relevant markets, Rate Counsel urges the Commission to establish detailed price, cost and revenue reporting requirements so that the Commission can provide adequate oversight of the video industry. The purpose of such reporting is to assist the Commission in ensuring that consumers have access to diverse video programming at affordable rates and reasonable terms and conditions.

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42 / *See* 47 CFR §76.924(j).

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